

JUN 7 1984

ALEXANDER L. STEVAS.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOSEPH M. HOUGHTON,

*Petitioner**v.*PRUDENTIAL PROPERTY & CASUALTY INSURANCE
COMPANY, KEYSTONE INSURANCE COMPANY,
BENJAMIN E. ZUCKERMAN, ESQUIRE and
DEAN B. STEWART, JR., ESQUIRE,*Respondents*

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT**

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QUESTION PRESENTED FOR REVIEW

Under the “public function theory”, does not a litigant and/or attorney who invoke the subpoena power act for the State since it is the State, not the litigant or attorney, which is compelling the attendance and thus, does not the misuse and abuse of that subpoena power to invade Constitutionally-protected rights to privacy create a valid cause of action under 42 U.S.C. §1983?

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The petitioner, Joseph M. Houghton, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 14, 1984.

OPINIONS BELOW

Memorandum Opinion of the Court of Appeals, unreported, appears in the Appendix hereto. The Order and Memorandum Opinion rendered by the District Court for the Eastern District of Pennsylvania, unreported, also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on March 14, 1984, and this Petition for Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is evoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

“§1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. §1979; Pub.L. 96-170, §1, Dec. 29, 1979, 93 Stat. 1284.”

STATEMENT OF CASE

This case involves the misuse and abuse of subpoena power by lawyers for insurance companies to secure highly-sensitive medical records, including psychiatric records and photographs of petitioner, a non-party to a disputed claim for injuries arising from an automobile accident.

This case is presently before this Court from the affirmance by the Court of Appeals of the dismissal of petitioner's civil rights' action by the District Court under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and as such, all disputed facts were taken in the light most favorable to the petitioner.

One, John J. Cassidy, sued the Prudential Property & Casualty Insurance Company and Keystone Insurance Company, in state court for injuries which he suffered in an automobile accident. Houghton was not a party to the Cassidy actions nor a claimant or eyewitness, as he was not in the vehicle nor at the scene of the Cassidy accident. Nevertheless, in the course of contesting Cassidy's claim, the insurance company attorneys issued subpoenas for Houghton's medical records to a physician and chiropractor who, under threat of contempt, produced those records. The records were reviewed, copied and disseminated. Houghton was unaware of the attempt to obtain his records until they were already in the hands of the insurance companies. The records included information, psychiatric report and photographs of Houghton which were highly sensitive, personal, confidential and of an embarrassing nature.

The sole issue upon which the District Court based its dismissal and upon which the Court of Appeals passed judgment, was whether use of the state subpoena process is sufficient "state action" to state a cause of action under 42 U.S.C. §1983.

REASONS FOR GRANTING THE WRIT

I.

DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND THIS COURT HOLDING THAT SUBPOENA POWER IS THAT OF THE STATE.

The Third Circuit's decision that the use of the state subpoena process does not sufficiently implicate state action is at odds with the Second Circuit's decision in *United States v. Wiseman*, 445 F.2d 792 (2nd Cir.), cert. den'd., 404 U.S. 967, 92 S.Ct. 346, 30 L.Ed.2d. 287 (1971), the validity of which has been recognized by the Fourth Circuit in *Wilkins v. Rogers*, 581 F.2d 399, 405 (4th. Cir. 1978), and repeatedly recognized in subsequent decisions of, the Second Circuit, and District Courts of New York, Pennsylvania and Ohio: *Taylor v. Consolidated Edison Co. of New York, Inc.*, 552 F.2d 39, 42 (2nd. Cir. 1977); *Ruffler v. Phelps Memorial Hosp.*, 453 F.Supp. 1062, 1067-1068 (S.D. New York 1978); *Timson v. Weiner*, 395 F.Supp. 1344 (S.D. Ohio, E.D. 1975); *Carrasco v. Klein*, 381 F.Supp. 782, 785 (E.D. New York 1974); *Isaacs v. Bd. of Trustees of Temple Univ., Etc.*, 385 F.Supp. 473, 485 (E.D. Pa. 1974), all of which acknowledge the *Wiseman* decision as an example of the application of the "public function theory"¹ to actions of private individuals.

In *Wiseman*, the defendants were charged with violation of 18 U.S.C. §242², which is the criminal counter-

1. The "public function theory" is firmly entrenched in §1983 law. *Rendell-Baker v. Kohn*, ____ U.S. ____, 102 S.Ct. 2754 (1982); *Jackson v. Metropolitan-Edison Co.*, 419 U.S. 345, 95 S.Ct. 449 (1974); see, also, *Weisman v. Sherry*, 514 F.Supp. 728 (1981) (recognizing that federal courts have applied the public function doctrine to private actions in a variety of contexts).

2. It is clear that the synonymous standards of "color of state law" and "state action" are also synonymous standards as used in the context of 18 U.S.C. §242 and the concept under 42 U.S.C. §1983. *Lugar v. Edmondson Oil Co.*, ____ U.S. ____, 102 S.Ct. 2744, at 1249, n. 9 (1982); *Blum v. Yaretsky*, ____ U.S. ____, 102 S.Ct. 2777 (1982).

part of 42 U.S.C. §1983. The *Wiseman* defendants were *privately employed* process servers convicted of fraudulently completing and filing Affidavits of Service. The Second Circuit Court of Appeals was faced with the specific question of whether state action existed. The Court found state action under the "public function theory":

"Unlike most functions involved in the conduct of a lawsuit by private parties, the service of summons is essentially and traditionally a public function. . . . that the defendants sought to take advantage of their authority to perform this 'act of public power' by signing blank affidavits of service without actually effecting service does not remove their activities from the 'public' classification . . . [T]o violate Section 242, an act need not have been made in compliance with law but merely 'under color of law'. . . .

Accordingly, we conclude that the activity involved in this case is activity which even when performed by a private party constitutes a 'public function', and constitutes state action under that theory." 445 F.2d 792 at p. 795.

Four years later, in *Timson v. Weiner*, *supra*, the *Wiseman* rationale was applied in a civil action under 42 U.S.C. §1983. In that case, a decision arising from defendant's motion to dismiss for lack of state action, plaintiff alleged that he was served with a subpoena by a private attorney, (who had requested and was granted sequestration of witnesses at a public hearing for the State Personnel Board of Review), maliciously and with the intent of preventing plaintiff from attending that public hearing. In short, plaintiff alleged deprivation of a constitutional right through the use of a subpoena. The district court, based on the public function theory as applied in *Wiseman*, found the requisite state action:

"A subpoena is the order of an arm of the state compelling the presence of a person under threat of

contempt. . . . *That the state traditionally grants litigants and their attorneys the privilege of invoking the subpoena power does not alter the fact that it is the state, not the litigant or his attorney, which is compelling the attendance. . . . The litigant or attorney who invokes the subpoena power acts for the state.* *Id.* at pp. 1347, 1348 and 1349. (Emphasis added).

Notwithstanding these numerous decisions applying the "public function theory" to the use of the subpoena power, and the obvious conflict between those decisions and the instant decision of the Court of Appeals, the Court of Appeals did not address those cases presented to them. The district court, however, addressed those decisions, doubting their precedential value in light of this Court's decisions in *Lugar v. Edmondson Oil Co., Inc.*, *supra*, and *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978).

The Third Circuit's decision also ignored and at least implicitly conflicts with this Court's recent decision in *Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211 (1977). Implicit in this Court's holding that the federal court should abstain in an action to enjoin as unconstitutional, New York statutory provisions authorizing contempt for failure to respond to a subpoena requiring a judgment-debtor to attend a deposition in aid of satisfaction of the judgment, was the recognition by this Court that the use of the subpoena and its correlate contempt power are indeed state functions:

"The contempt power lies at the core of the administration of a state's judicial system, *cf. Ketchum v. Edwards*, 153 N.U. 534, 539, 47 N.E. 918, 920 (1897). Whether disobedience of a court-sanctioned subpoena, and the resulting process leading to a finding of a contempt of court, is labeled civil, quasi-criminal, or criminal in nature, we think that the salient fact is that federal-court interference with the state's contempt process is 'an offense to the state's

interest . . . likely to be every bit as great as it would be were this a criminal proceeding.' (citation omitted). Moreover, such interference with the contempt process . . . 'unduly interfere(s) with legitimate activities of the Stat[e],' [citation omitted]". *Id.*, 97 S.Ct. at p. 1217.

There can be little doubt that the subpoena power is only that of the state, and that the use of that subpoena power even by a private individual is "state action". Until a definitive statement is issued by this Court clearly establishing that the use of subpoena power constitutes state action for purposes of the Civil Rights' Act, there remains the unequal application of the sanctions, both criminal and civil, provided for under the Civil Rights' Act involving basic Constitutional rights³ in an area which touches upon a substantial portion of the United States citizenry, namely, those involved in litigation in state courts. The issue presented is so basic and pervasive to our legal system of justice, that a definitive decision is needed now.

II.

SINCE STATES UNIFORMLY ALLOW UNBRI-
DLED ACQUISITION OF STATE SUBPOENAS
BY LITIGANTS AND THEIR ATTORNEYS AS A
PRACTICAL NECESSITY TO PROVIDING AN
EXPEDITIOUS AND EFFECTIVE FORUM FOR
LITIGATION OF LEGAL DISPUTES, THIS
COURT MUST UNEQUIVOCALLY ESTABLISH
THAT THE USE OF STATE SUBPOENAS IS

3. There is little doubt that the right to privacy is constitutionally protected. *Roe v. Wade*, 410 U.S. 113 (1973); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965), and that the right to privacy in medical records not only falls within the constitutional privacy rights, but indeed on a higher plane. See, *U.S. v. Westinghouse Elec. Corp.*, 638 F.2d 570 at p. 577 (3rd. Cir. 1980), . . . "information concerning one's body has a special character."

STATE ACTION SUBJECTING THE USERS OF
THOSE SUBPOENAS TO ACCOUNTABILITY
FOR VIOLATIONS OF CONSTITUTIONAL
RIGHTS THROUGH THE USE OF THOSE SUB-
POENAS.

The practice followed in the instant case where subpoenas of the Commonwealth of Pennsylvania are obtained simply by purchasing them from the Prothonotary of the local county Court of Common Pleas, is undoubtedly the common practice throughout the courts of the states of the United States and indeed, even of the federal district courts. The Third Circuit noted that petitioner did not challenge below that the state statute authorizing the subpoena power was unconstitutional; however, there would seem to be no basis upon which such a challenge could be leveled. It seems obvious that the state's interest in providing its citizens with an expeditious and effective forum to litigate disputes must, as a practical necessity allow the unbridled acquisition of such subpoenas by entrusting the litigants and their attorneys with this substantial state power. Indeed, it would seem incongruous to an effective and expeditious forum for litigation to require prior judicial intervention in order to obtain such subpoenas, particularly in light of the overcrowded dockets throughout the courts of the states. Moreover, it would seem that such a challenge would be prohibited by this Court's decision in *Juidice v. Vail, supra*, prohibiting federal interference with the state's legitimate activities in exercising their subpoena and contempt powers. It is not the obtaining of these subpoenas that demands this Court's judicial intervention, but the misuse of those subpoenas once obtained, to violate a citizen's constitutionally-protected rights that requires this Court's judicial guidance. It is our citizen's ever-growing erosion of their valued rights to privacy that needs to be protected. The potential for misuse of the state's subpoena power to deprive one's Constitutional rights of privacy, liberty, property, speech

and due process of law, such as in the instant case, *Wiseman supra*, and *Timson, supra*, are readily apparent. To allow such deprivation of civil rights through state action go unredressed, contrary to the mandates of the Civil Rights' Act, specifically 42 U.S.C. §1983, would be tantamount to sanctioning a private state police force embodied with investigative powers beyond the reach of the United States Constitution and the Civil Rights' Act.

The use of the subpoena power permeates civil and criminal proceedings throughout, and involve paramount Constitutional rights. It is now time to halt the Constitutional abuse of that subpoena power and to forewarn all that may seek to invoke the strong arm of the state compelling the presence of a person or records or other tangible things, or both, under threat of contempt, that they do so knowing they will be held accountable under the Civil Rights' Act for a violation of a person's rights through the misuse of that subpoena power.

CONCLUSION

For all the reasons herein stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX



UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1395

JOSEPH M. HOUGHTON,

Appellant

v.

PRUDENTIAL PROPERTY & CASUALTY
INSURANCE COMPANY, KEYSTONE INSURANCE
COMPANY, BENJAMIN E. ZUCKERMAN, Esquire,
and DEAN B. STEWART, JR., Esquire,
Appellees

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

C.A. No. 83-1273

District Judge: Charles R. Weiner

Submitted Under Third Circuit Rule 12(6)
January 23, 1984

Before: ADAMS and GARTH, *Circuit Judges*, and
BROTMAN, *District Judge**

(Filed March 14, 1984)

MEMORANDUM OPINION OF THE COURT

ADAMS, *Circuit Judge*.

* Honorable Stanley S. Brotman, United States District Court
for the District of New Jersey, sitting by designation.

This case involves the alleged abuse of subpoena power by lawyers for insurance companies to secure the medical records of Joseph Houghton, a non-party to a disputed claim for injuries arising from an automobile accident.

a.

John Cassidy sued the Prudential Property & Casualty Insurance Company and the Keystone Insurance Company in state court for injuries which he suffered in an automobile accident. Cassidy was treated by a physician and chiropractor and in the course of defending the claim the insurance companies subpoenaed them both for depositions along with their records. Joseph Houghton, the plaintiff here, was not involved in any manner with Cassidy except that Houghton had the same treating physician and chiropractor. Houghton did not have a claim against the insurance companies, was not a witness to any of the underlying facts concerning Cassidy's accident, and was not in any other sense associated with the Cassidy claim. Nevertheless, in the course of contesting Cassidy's claim, the insurance company attorneys secured subpoenas for Houghton's medical records, obtained the records and then had the records copied.

Houghton asserts that he was unaware of the attempt to obtain his records until they were already in the hands of the insurance companies. The defendants contend that this is untrue and that Houghton's attorney had been informed of their interest in the records, but had failed to move the state court to quash the subpoenas. Because the district court dismissed Houghton's action under Rule 12(b)(6) of the Federal Rules of Civil Procedure, we must take all disputed facts in the light most favorable to the plaintiff. Accordingly, the sole issue before this Court today is whether the claimed abuse of the subpoena process is sufficient to state a cause of action under 42 U.S.C. §1983.

b.

There is no doubt that Houghton's allegations, if proved, would establish a cause of action under state law, but a different question is presented in a § 1983 suit. In a § 1983 suit, a plaintiff has the burden of alleging not simply tortious conduct, but that such conduct was under color of state law. *United States v. Classic*, 313 U.S. 299, 326 (1941) ("misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law"). In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 932 (1982), the Supreme Court noted that conduct satisfying the state action requirement of the Fourteenth Amendment would also suffice for a § 1983 cause of action. The question in this appeal is, therefore, whether the alleged abuse of the state subpoena process sufficiently implicates state action or is sufficiently under color of state law so as to survive a motion to dismiss.

Because the alleged deprivation of Houghton's rights was not the action of state officials, plaintiff bears the burden of establishing that the private action of the attorneys for the insurance companies was "fairly attributable" to the state. Under *Lugar* this is accomplished through a two-pronged test:

First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.

The first prong of this test is satisfied by the use of the subpoena power to deprive Houghton of what he claims to be constitutionally recognized privacy rights. The second prong, however, is where Houghton's claim falters. There is no allegation that the attorneys for the insurance companies acted in concert with or in a conspiracy with state officials, *see Adickes v. Kress & Co.*, 398 U.S. 144 (1970), that the state statute authorizing the subpoena power is unconstitutional either on its face or as applied, *see Lugar*, 457 U.S. at 952, or that there was in existence at the time the subpoenas were obtained a pattern or practice of private enlistment of state officials to accomplish impermissible ends, *see Cruz v. Donnelly*, No. 81-5070, slip op. at 6 (3d Cir., Feb. 10, 1984). Without such allegations, the claims of state involvement are not sufficient to state a cause of action under §1983.

For the foregoing reasons, the judgment of the district court is hereby affirmed.

TO THE CLERK:

Kindly file the foregoing opinion.

Circuit Judge

Dated:

:C.A. NO. 83-1273

ORDER

MAY 31, 1983

1. Defendants' motions to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) are GRANTED since, taking as true the allegations in the complaint, I find that the misuse or abuse of the subpoena power of the state is not action "under color of state law" within the mean of 42 U.S.C. §1983. See *Lagar v. Edmonson Oil Co., Inc.*, ___ U.S. ___, 102 S.Ct. 2744, 2756-57 (1982) ("[V]alid cause of action under §1983 [stated] insofar as [petitioner] challenged the constitutionality of the Virginia [prejudgment attachment] statute; he did not, insofar as alleged only misuse or abuse of the statute."); *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 160 n. 10 and 164-65 (1978); *Earnest v. Lowentritt*, 690 F.2d 1198, 1200 (5th Cir. 1982); *Folsom Inv. Co., Inc. v. Moore*, 681 F.2d 1032, 1037 (5th Cir. 1982); *Lindley v. Amoco Production Co.*, 639 F.2d 671, 673 (10th Cir. 1981); *Chicarelli v. Plymouth Garden Apts.*, 551 F.Supp. 532, 538 (E.D. Pa. 1982). To the extent that *United*

States v. Wiseman, 445 F.2d 792 (2d Cir.), *cert. denied*, 404 U.S. 967 (1971) and *Timson v. Weiner*, 395 F.Supp. 1344 (S.D. Ohio 1975) suggest a contrary conclusion, I note that the precedential value of those decisions is seriously undermined by *Lagar* and *Flagg Bros.*, *supra*.

2. Defendants' motions for attorney's fees pursuant to 42 U.S.C. §1988, 28 U.S.C. §1927 and Fed.R.Civ.P. 11 are DENIED because, in light of the foregoing precedent, I find that there has not been a sufficient showing that the action was frivolous, unreasonable without foundation, or vexatious within the meaning of those statutes.

Accordingly, the above-captioned action is dismissed with prejudice and costs shall be taxed against the plaintiff pursuant to Fed.R.Civ.P. 54(d).

IT IS SO ORDERED.

CHARLES R. WEINER

